No. 86-966

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

HARRY E. BECK, JR., *et al.*,
Petitioners,

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MEMORANDUM OF THE RESPONDENT

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TABLE OF AUTHORITIES

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The petition for certiorari uses several different formulations to raise a single question, *see* Pet. at i:

> the injunction the District Court devised, and the Court of Appeals approved, to prevent the illegal exaction of 'agency fees' from petitioner nonunion employees by respondent Communications Workers of America ["CWA"] . . . fail[s] to meet the procedural requirements for 'agency-fee' arrangements this Court established in *Chicago Teachers Union, Local No. 1 v. Hudson*, —— U.S. ——, [54 L.W. 4231 (March 4, 1986)].

As we show below, that question does not merit plenary consideration by this Court at this time for two independent reasons.

First, because *Hudson* is of such recent vintage, neither the courts below, nor any other federal court, have had the opportunity to consider whether the rules announced in *Hudson* to govern the procedures used in collecting agency fees in the public sector apply to injunctive relief for individually-named plaintiffs challenging the application to them of an agency fee requirement in a privately-negotiated collective bargaining agreement in an industry covered by the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, *et seq.* ("NLRA"). Nor have the courts below in this case had the occasion to decide whether, if *Hudson* applies, the new rules announced therein require modification of the district court's injunction.

Second, the question plaintiffs posed in the certiorari petition presupposes that the "exaction of agency fees" from the plaintiffs here is "illegal." That precise issue is raised by CWA's certiorari petition from the decision below (No. 86-637). The Court's disposition of that petition could moot or significantly affect the issue raised in the petition here. Indeed, it is impossible to discuss in a reasoned way what procedural requirements CWA must meet in collecting agency fees until it is first determined whether any substantive constraints are placed on CWA in this regard, and, if so, the source of such constraints.

1. (a) On August 9, 1983, the district court entered the order and injunction which is the source of plaintiffs' challenge. *See* Pet. App. 107a-09a. Finding that plaintiffs could not lawfully be required to pay full dues to CWA despite the union security provision in CWA's collective bargaining agreement with AT&T and C&P Telephone, the district court "enjoined [CWA] from retaining . . . from the plaintiffs . . . the amount certified as non-retainable by an independent Certified Public Accountant . . . who has used the system of record keeping and alloca-

tions designed by the experts of CWA [and approved by the Court]." *Id.* at 108a. The injunction provides for judicial review, at plaintiff's behest, of the auditors' annual determination of the "non-retainable" amount. *Id.* at 108a-09a. And the injunction further requires CWA "each fiscal year [to] hold in an interest-bearing escrow account, a portion of the agency fees paid by each plaintiff equal to twice the amount determined in the previous-fiscal year to be non-retainable." *Id.* at 109a.

On October 24, 1985, a panel of the Fourth Circuit affirmed this injunction in all relevant respects. Rejecting CWA's appeal, the panel agreed with the district court that the union security clause which conditioned plaintiffs' continued employment on the payment of full dues to CWA violated plaintiffs' First Amendment rights, and the panel also found that clause violative of plaintiffs' rights under § 8(a)(3) of the NLRA, 29 U.S.C. § 158 (a)(3). But rejecting plaintiffs' cross-appeal, the panel found the injunction to be proper, reasoning that it "complies with the mandate of *Ellis* [*v. Railway Clerks*, 466 U.S. 435 (1984)]". Pet. App. 81a. The panel explained, *id.* at 82a:

> Under the injunction prescribed by the district court, CWA will be unable to "commit dissenters funds to improper uses even temporarily" because the escrow account is not subject to CWA control. Consequently, the permanent injunction prescribed by the district court adequately protects plaintiffs' rights because CWA will derive no benefit from the amount determined to be non-retainable.[33] *Hudson v. Chicago Teachers Union Local 1*, 743 F.2d 1187, 1197 (7th Cir. 1984).

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[33] Plaintiffs further contend that only an advance reduction approach can adequately protect their statutory rights. This contention, however, is without merit, for the Supreme Court in *Ellis* expressly sanctioned either an advance reduction *or* an interest bearing escrow account approach. Either approach is adequate because each prevents a union from extracting a forced loan from non-consenting payors.

CWA sought rehearing *en banc* of the panel's substantive ruling, *viz.*, the holding that the union security clause violated plaintiffs' rights under the First Amendment and NLRA § 8(a)(3). *Plaintiffs did not request reconsideration of the panel's remedial decision, viz., the affirmance of the district court's injunction.*

The Fourth Circuit granted CWA's suggestion for rehearing *en banc* and received supplemental briefs and held oral argument limited to the issues CWA had raised. On September 12, 1986, the *en banc* court issued a *per curiam* opinion/order announcing that by a vote of 6-4, that court had concluded, albeit without a majority rationale, that the union security agreement was violative of plaintiffs' rights. *See* Pet. App. 1a-6a. *The en banc court did not discuss the propriety of the district court's injunction as that issue was not before it.*

(b) Plaintiffs now contend that the injunction "fails to meet," "violates," and "flies in the face of" *Hudson*, Pet. at 19, 22, 23, and on that basis plaintiffs seek the issuance of a writ of certiorari. But *Hudson* was not decided until March 4, 1986, almost three years *after* the district court issued its injunction, and several months *after* the panel affirmed that injunction. Thus, only the *en banc* court had any opportunity even to consider what relevance, if any, the First Amendment rules announced in *Hudson*—rules the *Hudson* opinion acknowledges the Court "ha[d] not . . . specified in the past," 54 L.W. at 4235 —have in the instant case. And the *en banc* court had no *occasion* to address that issue, as *plaintiffs* did not present the remedial aspects of this case to the *en banc* court for decision.

Accordingly, plaintiffs are asking this Court to decide in the *first instance* questions that were not presented to any court below. That is not the role of this Court.

2. This conclusion is buttressed by the fact that the questions plaintiffs tender not only were not decided

below, but have never been considered by any federal court in any case. Moreover, those questions cannot be considered in a reasoned fashion until the threshold, substantive issues that divided—indeed fractured—the *en banc* court in this case, and that are raised in CWA's petition from the decision below, No. 86-637, are resolved authoritatively.

To begin with, if, as CWA will urge if its certiorari petition were granted and as the Second Circuit concluded in *Price v. Autoworkers*, 795 F.2d 1128 (2d Cir. 1986), *pet. for cert. pending*, No. 86-1055, this Court were to hold that federal law does *not* prohibit private parties in industries covered by the NLRA negotiating and enforcing union security provisions requiring all bargaining unit members to pay full union dues to the bargaining representative, the remedial issues plaintiffs seek to raise in this case would become academic. Plaintiffs' argument here rests on the proposition that "[t]he existence of a substantive limitation on the size of 'agency fees' implies some procedural device adequate to the enforcement of that limitation," Pet. at 17. And plaintiffs are challenging the injunction the district court issued to prevent future violations of plaintiffs' (asserted) right not to support union activities unrelated to collective bargaining. If there is no such right or "substantive limitation" on CWA's collection of full dues from plaintiffs, there would be no warrant for an injunction or other "procedural device" as CWA would be free to collect full dues from all persons the union represents. Thus, this Court's resolution of CWA's petition could effectively moot plaintiffs' petition.

Moreover, even if the Court were to recognize a "substantive limitation" on the freedom of private-sector unions in industries covered by the NLRA to collect agency fees, the source and scope of that limitation could be of determinative importance in assessing the applicability of *Hudson* and, correlatively, in evaluating whether

the injunction the district court entered suffices to prevent future violations of whatever substantive rights this Court recognizes.

If, for example, the Court were to conclude (as did two judges below) that a private union security agreement implicates the state to a degree sufficient to trigger First Amendment requirements, then, of course, the procedures mandated by *Hudson* would be applicable to such arrangements. In that event, the only remaining task would be to determine whether, in the context of this litigation, *Hudson* requires modification of the district court's injunction. That task would appropriately be left to the lower courts.

Four judges below, however, found substantive limitations on CWA's collection of agency fees only in § 8(a)(3) and/or the duty of fair representation, and not in the First Amendment. *Hudson* itself recognizes that "'[p]rocedural safeguards often have a special bite in the First Amendment context.'" 54 L.W. at 4234 n.12. Thus, if this Court were to agree that only statutory, and not constitutional rights are implicated here, *Hudson* would not be directly applicable as *Hudson* states only constitutional rules. In that event, a threshold question of first impression would arise as to whether the escrow procedure mandated by the district court—a procedure which, as the panel below recognized, meets the Railway Labor Act's requirements as set forth in *Ellis*—is adequate to protect plaintiffs' statutory rights under the NLRA.

That question was not decided below and has not been decided by any other federal court, as no other court, either pre- or post-*Hudson*, has read § 8(a)(3) as did five of the judges in the majority below, nor has any court understood the duty of fair representation as did Judge Murnaghan in joining to affirm the district court. Accordingly, the remedial questions that would arise if

this Court were to find a statutory violation are the type of novel questions the Court should not reach out to decide at this time.

CONCLUSION

For the foregoing reasons, the certiorari petition here (No. 86-966) should be held pending a decision on CWA's certiorari petition in No. 86-637. If CWA's petition were granted, action on this petition should be further deferred pending a decision on the merits on the substantive questions raised by CWA; should CWA prevail, plaintiff's petition should be denied as the questions presented by plaintiffs would be moot. If CWA's petition were denied, or if CWA's petition were granted and plaintiffs were to prevail on the merits, the remedial questions raised by this petition should be remanded to the appellate court for decision.

Respectfully submitted,

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